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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 711

T. C. FRY, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ARTHUR J. HILLAND
410 Shoreham Building
Washington, D. C. 20005
Attorney for Petitioner
T. C. Fry, Jr.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner prays that this Court grant rehearing of its order of January 18, 1965, denying his Petition For Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case, as prayed for in the petition filed November 20, 1964, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The single issue which petitioner requests this Court to review is one which was "available to petitioner although not previously presented" to this Court (Rule 58, Rules of The Supreme Court of the United States); namely, whether the doctrine of harmless error is broad enough to permit an affirmance in a case where all three judges on the court below agreed that only 200 out of the 4,743 complaints testified to by government witnesses had any bearing on the intent with which certain allegedly misleading representations were made. Two of the judges of the court below concluded the error was harmless. The third judge felt the error was so prejudicial as to require a new trial.

In this mail-fraud case, in an effort to prove an intent to defraud, the trial court permitted a postal inspector and Chamber of Commerce employees to testify that they knew of 4,743 complaints from defendants' 50,000 customers.

The court below unanimously concluded the admission in evidence of 4,543 of the complaints was error; two judges of the court below concluded the error was harmless despite their recognition of the inadequacy of the trial court's curative instruction—and one judge felt the error was so prejudicial as to require a new trial. The inadmissible evidence making up the government's case clearly exceeded the permissible limits of harmless error. This case calls for an expression by this court of the limitations on the doctrine of harmless error—a field of judicial interpretation sorely in need of a salutary sign-post erected by this Court..

The case for petitioner is best summed up by the opinion of the dissenting judge below:

> "The errors in the admission of evidence of complaints and dissatisfaction and the error in the charge cannot be disregarded as not of critical importance. The inadmissible evidence of complaints and dissatisfaction may well have been the deciding factor. . . . The Government's burden was to demonstrate fraudulent intent. The jury could well have said, 'The comparatively few instances where the prosecution presented dissatisfied customers as witnesses may all have been the result of innocent mistakes or carelessness or chance, but when they add thousands more we have to rule out mistakes and carelesssness and chance; the defendants must have intended to defraud people.' "

A consideration overlooked by the majority opinion below is that "Numbers are vitally important in trial, especially in criminal matters." *Kotteakos* v. *United States,* 328 U.S. 750, 772. The reasoning of the majority could apparently be applied whatever the volume of inadmissible evidence, and yet, "the line must be drawn somewhere". *Kotteakos* v. *United States, supra,* at page 774.

Nineteen years have gone by, and many a lower court decision construing "harmless error" has been rendered since this Court said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is

rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States, supra,* at page 765

After nineteen years of judicial travel, charted only by the *Kotteakos* decision, the time has come for this Court once again to address itself to the limitations inherent in the doctrine of harmless error, a consideration in virtually every criminal appeal. This Court should reconsider and grant the petition for certiorari.

CONCLUSION

For the reasons set fourth above, it is respectfully urged that rehearing of the Petition for Certiorari be granted, and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ARTHUR J. HILLAND
410 Shoreham Building
Washington, D. C. 20005
Attorney for Petitioner
T. C. Fry, Jr.

APPENDIX

RULE 52, FEDERAL RULES OF CRIMINAL PROCEDURE

"Harmless Error and Plain Error.

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

ARTHUR J. HILLAND